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May 30, 2000

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EXECUTIVE SECRETARY

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Complaint of Intermedia Communications, Inc. Against BellSouth Telecommunications, Inc. To Enforce The Reciprocal Compensation Requirement of the Parties' Interconnection Agreement*
Docket No. 00-00280

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of the Answer of BellSouth Telecommunications, Inc. While the Answer was timely filed on May 5, 2000, BellSouth has recently been made aware that page 6 was missing from some of the copies. The Answer is therefore being refiled in its entirety to avoid any confusion. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Complaint of Intermedia Communications, Inc. Against BellSouth Telecommunications, Inc. To Enforce The Reciprocal Compensation Requirement of the Parties' Interconnection Agreement*

Docket No. 00-00280

ANSWER OF BELL SOUTH TELECOMMUNICATIONS, INC.

COMES NOW, BellSouth Telecommunications, Inc. ("BellSouth") and in response to the Complaint of Intermedia Communications, Inc. ("Intermedia"), states as follows:

Notwithstanding Intermedia's allegations to the contrary, the Interconnection Agreement between Intermedia and BellSouth ("Agreement") does not obligate BellSouth to pay reciprocal compensation for ISP-bound traffic. The reciprocal compensation obligations in the Agreement apply only to "local traffic" as defined in the Agreement, and BellSouth and Intermedia did not mutually agree to pay reciprocal compensation for traffic that is interstate in nature and that does not terminate locally. Therefore, no reciprocal compensation is due for such traffic and Intermedia's claims are without merit.

Last year, in its Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("ISP Declaratory Ruling"), the FCC concluded that Internet communications "*do not terminate at the ISP's local server ... but continue to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state.*" ISP Declaratory Ruling, at ¶ 12 (emphasis added). In so

doing, the FCC rejected any attempt “to divide communications at any intermediate points of switching or exchanges between carriers,” and squarely held that Internet communications are “non-local.” *Id.* at ¶ 26 n. 87. Finally, the FCC held that “the reciprocal compensation requirements of section 251(b)(5) of the Act and ... of the Commission’s rules do not govern inter-carrier compensation for [ISP-bound] traffic.” *Id.*

In March of this year, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the ISP Declaratory Ruling for further analysis by the FCC. In its decision, the D.C. Circuit recognized that, under the FCC’s regulations, reciprocal compensation is due on calls to the Internet if, and only if, such calls “terminate” at the ISP’s local facilities. *Bell Atlantic Telephone Companies v. FCC*, Case No. 99-1094, 2000 WL 273383 (D.C. Cir. March 24, 2000), *Slip Op.* at 9-11. The D.C. Circuit held, however, that the FCC had not adequately explained its conclusion that calls to an ISP do not terminate at the ISP’s local point of presence but instead at a distant website. It therefore remanded the matter to permit the FCC to explain the point more fully. *See id.* at 15.

It appears unlikely that the D.C. Circuit’s ruling will have any impact on the FCC’s view of ISP-bound traffic. On the contrary, the FCC has already indicated informally that it believes that it can provide the requisite clarification and reach the same conclusion that it has reached previously – that is, that Internet-bound calls do not terminate locally. *See Telecommunications Reports*, “FCC Stands By Conclusion That Calls To ISPs Are Interstate, Despite Court’s Nixing 1999 Order,” March 27, 2000 (noting that Chief of the FCC’s Common Carrier Bureau Lawrence Strickling does not

“read this decision as telling us that we made a mistake,” but only requiring that the FCC “take the confusing precedents and make clear to the court why [Internet Traffic] is interstate traffic.”)

Furthermore, the FCC has already addressed in a different recent order one of the primary concerns expressed in the D.C. Circuit opinion. *See slip op.* at 13-14. Specifically, the D.C. Circuit was concerned that the FCC had not sufficiently explained in the order under review why Internet service constituted “exchange access” and not “telephone exchange service.” At the same time, the D.C. Circuit acknowledged that the “statute appears ambiguous as to whether calls to ISPs fit within ‘exchange access’ or ‘telephone exchange service’ and on that view any agency interpretation will be subject to judicial deference.” *Id.* at 15. However, the FCC has explained in detail that calls to ISPs of the sort at issue here constitute interstate “exchange access” not “telephone exchange service.” Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-413, 1999 WL 1244007, ¶ 43 (Dec. 23, 1999) (copy attached). The D.C. Circuit declined to consider the FCC’s conclusion in that Order because this argument was not part of “the ruling under review.” *Slip op.* at 14.

Even without the ISP Declaratory Ruling, decades of FCC precedent make clear that ISP-bound traffic does not terminate at the ISP and thus is interstate in nature, as the FCC confirmed again in December 1999. BellSouth acknowledges that a number of state commissions, including the Tennessee Regulatory Authority (“Authority”), and some district courts, have held that reciprocal compensation is due for ISP-bound traffic. However, in many of these proceedings, including *In re: Petition of Brooks Fiber to*

Enforce Interconnection Agreement and for Emergency Relief, Docket 98-00118¹, the commission in question reached its decision prior to the ISP Declaratory Ruling. The FCC has since made clear, however, that ISP-bound traffic is interstate and thus is not subject to the reciprocal compensation requirements of the Act.

For these reasons, the Authority should conclude that the parties did not mutually agree to pay reciprocal compensation for ISP-bound traffic under the terms of the Agreement and deny Intermedia's claim for relief. Moreover, although Intermedia did not specifically raise the issue, there is a dispute over the appropriate reciprocal compensation rates to be used by the parties. Thus, BellSouth respectfully requests that the Authority find that the appropriate reciprocal compensation rates are those set forth in the parties' June 3, 1998 Amendment to the Interconnection Agreement. Finally, the Authority should deny Intermedia's request for an expedited proceeding. This is an ordinary breach of contract claim that does not require special treatment by the Authority.

For answer to the specific allegations in the Complaint, BellSouth states as follows:

1. BellSouth is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1 of the Complaint, and therefore denies the same.
2. BellSouth admits the allegations in Paragraph 2 of the Complaint.
3. BellSouth admits that it is authorized to provide service in the state of Tennessee. BellSouth is without knowledge or information sufficient to form a belief as

¹ It also is important to note that the Authority's decision in *Brooks Fiber* currently is on appeal to the United States District Court for the Middle District of Tennessee.

to the truth of the remaining allegations in Paragraph 3 of the Complaint, and therefore denies the same.

4. BellSouth admits the allegations in Paragraph 4 of the Complaint. BellSouth affirmatively asserts that the Agreement speaks for itself.

5. BellSouth admits the allegations in Paragraph 5 of the Complaint.

6. BellSouth admits that the Authority has jurisdiction over this Complaint. BellSouth denies the remaining allegations in Paragraph 6 of the Complaint, and specifically denies that it is obligated to pay reciprocal compensation for ISP-bound traffic.

7. BellSouth admits that the Authority has jurisdiction over this Complaint. By way of further response, BellSouth states that the Tennessee Code and the Supreme Court's decision speak for themselves, and thus require no admission nor denial.

8. BellSouth admits that it provides local exchange telecommunications services over its network. BellSouth is without knowledge or information sufficient to form a belief as to the truth of the allegation that Intermedia provides local exchange telecommunications services over its network, and therefore denies the same. BellSouth further denies that simply providing local exchange telecommunications services allows Intermedia's end-users to call BellSouth's end-users and vice-versa; rather, the parties must interconnect to permit such exchange of traffic.

9. BellSouth admits that it sent the letter attached as Exhibit 2 to the Complaint, and affirmatively asserts that the letter speaks for itself. BellSouth specifically denies that calls made to ISPs are "local calls" or that calls to ISPs "terminate" at the ISP. BellSouth further denies that as a result of the letter that it is

“now refusing” to pay reciprocal compensation. BellSouth affirmatively asserts that the letter only clarified the long-standing position of BellSouth that ISP traffic is interstate in nature, and not subject to the provisions of the Agreement governing reciprocal compensation. BellSouth denies the remaining allegations in Paragraph 9 of the Complaint.

10. BellSouth admits that it received the letter attached as Exhibit 3 to the Complaint, and states by way of further response that the letter speaks for itself. BellSouth denies any remaining allegations in Paragraph 10 of the Complaint.

11. BellSouth admits that it sent the letter attached as Exhibit 4 to the Complaint, and states by way of further response that the letter speaks for itself. BellSouth denies any remaining allegations in Paragraph 11 of the Complaint.

12. BellSouth denies the allegations in Paragraph 12 of the Complaint. BellSouth affirmatively asserts that it is in compliance with each and every provision of the Agreement and §251(b)(5) of the Act. Moreover, BellSouth affirmatively asserts that ISP-traffic is not included in the definition of “Local Traffic” in the Agreement. Further, BellSouth’s position on the payment of reciprocal compensation for ISP traffic is consistent with, and based upon, FCC precedent.

13. The Agreement speaks for itself and thus requires no admission nor denial.

14. The Agreement speaks for itself and thus requires no admission nor denial. BellSouth denies that the Agreement does not exclude calls to ISPs. BellSouth further denies that the ISP traffic in any way “terminates” on Intermedia’s network, as would be required for reciprocal compensation under the Agreement. To the contrary, ISP-bound traffic traverses Intermedia’s facilities and transits the ISP’s point of presence on its way

to the Internet. During this single end-to-end transmission between the end-user and the Internet website, multiple communications occur, often simultaneously, that may cross state and national boundaries. BellSouth denies any remaining allegations in Paragraph 14 of the Complaint.

15. BellSouth admits that Intermedia has billed BellSouth for reciprocal compensation. BellSouth further admits that Intermedia has improperly billed BellSouth for reciprocal compensation for ISP-bound traffic which is interstate in nature and thus not subject to the reciprocal compensation obligations of the Agreement. BellSouth also admits that it has paid Intermedia reciprocal compensation for the local traffic portion of the bills at the applicable reciprocal compensation rate, but has withheld payment of reciprocal compensation for ISP-bound traffic on the grounds that such traffic is interstate in nature and not subject to the reciprocal compensation obligations of the Agreement. BellSouth denies the remaining allegations in Paragraph 15 of the Complaint.

16. BellSouth denies the allegations in Paragraph 16 of the Complaint. BellSouth affirmatively states that BellSouth is not obligated to pay reciprocal compensation for ISP-bound traffic, and that the appropriate reciprocal compensation rates to be applied to any reciprocal compensation payments are the rates set forth in the parties' June 3, 1998 Amendment to the Interconnection Agreement rather than the rates used by Intermedia.

17. BellSouth admits that in Docket No. 98-00118, the Authority addressed the issue of reciprocal compensation for ISP-bound traffic in the context of the Brooks Fiber and BellSouth interconnection agreement. BellSouth admits that the Hearing Officer concluded as a matter of law that the term "local traffic" in the interconnection

agreement between BellSouth and Brooks Fiber includes ISP traffic. BellSouth affirmatively asserts that the terms of the Hearing Officer's Initial Decision speak for themselves. BellSouth denies the remaining allegations in Paragraph 17 of the Complaint.

18. BellSouth admits the allegations in Paragraph 18 of the Complaint. BellSouth affirmatively asserts that the terms of the Final Order speak for themselves.

19. BellSouth admits the allegations in Paragraph 19 of the Complaint, but specifically denies that calls to ISPs are "local traffic" or that calls to ISPs "terminate" at the ISP.

20. BellSouth denies that the Authority's action in the Brooks Fiber matter constitutes binding precedent for the resolution of this case. BellSouth affirmatively asserts that the decision in Docket No. 98-00118 was limited to the terms of the Brooks Fiber interconnection agreement and not the Agreement at issue here. Furthermore, BellSouth affirmatively asserts that since the Authority rendered its *Brooks Fiber* decision, the FCC has made clear that ISP-bound traffic is interstate in nature and is not subject to the reciprocal compensation obligations of the Act. BellSouth admits that the D.C. Circuit did remand the ISP Declaratory Ruling to the FCC for further consideration, but affirmatively asserts that the FCC will likely reach the same conclusion regarding the jurisdictional nature of ISP-bound traffic. BellSouth denies the remaining allegations in Paragraph 20 of the Complaint.

21. BellSouth admits that the Fifth Circuit Court of Appeals affirmed the decision of the U.S. District Court for the Western District of Texas upholding the Texas Public Utility Commission's ruling that the parties' interconnection agreement provided

for reciprocal compensation for ISP-bound traffic. BellSouth affirmatively asserts that the Fifth Circuit's decision was limited to interpreting the terms of the interconnection agreement between Southwestern Bell and Time Warner and not the Agreement at issue here. *Southwestern Bell v. The Public Utility Commission of Texas*, No. 98-50787, at 11 (5th Cir. March 30, 2000)("The district court held that the PUC did not act arbitrarily and capriciously because a reasonable *interpretation of the interconnection agreements* is that the parties were to treat calls to ISPs like calls to other end users. We agree.") (emphasis added). Finally, BellSouth affirmatively asserts that the Fifth Circuit's decision speaks for itself. BellSouth denies the remaining allegations in Paragraph 21 of the Complaint.

22. BellSouth denies that Intermedia is entitled to any of the relief sought in the Complaint.

23. Any allegations not specifically admitted are hereby denied.

WHEREFORE, having fully answered, BellSouth respectfully requests that the Authority convene a contested case and find in favor of BellSouth.

Respectfully submitted.

BELLSOUTH TELECOMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read 'Guy M. Hicks', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☒ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight

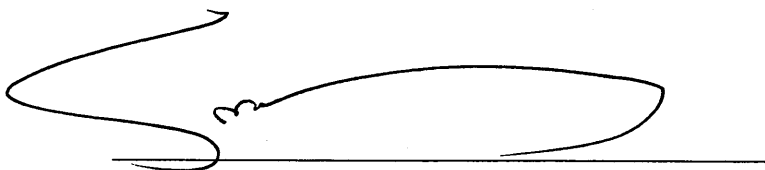
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A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line and a small flourish.